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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3104 of 2002

with

SPECIAL CIVIL APPLICATION No 4155 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

BHAILALBHAI R PATEL

Appearance:

1. Special Civil Application No. 3104 of 2002

MR ASHISH M DAGLI for Petitioner No. 1

MR JASWANT K SHAH for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/04/2002

COMMON ORAL JUDGEMENT

#. Heard Mr.A.M.Dagali, learned advocate appearing on behalf of the petitioner Corporation and Mr.Jashwant K. Shah, learned advocate for respondent workman.

#. Rule. Mr.Dagali, learned advocate for petitioner Corporation and Mr.J.K.Shah, learned advocate for respondent workman waive formal service of Rule in these cross petitions on behalf of the respective parties. Therefore, these two matters are heard finally at the admission stage with the consent of the parties.

#. In these two petitions, both the parties have challenged the common award passed by the labour court, Ahmedabad in Reference No.131 / 1996 dated 5th November, 2001. The labour court has granted reinstatement with continuity of service with 40 % backwages of the interim period. Today, when these two petitions, learned advocate Mr.Dagali for petitioner Corporation has tendered before this Court draft amendment in a petition - SCA No.3104 / 2002 filed by petitioner Corporation. Said draft amendment is granted with direction to the petitioner to carry out the same within period of three days from today. It is noticed that in the said draft amendment, the Corporation has added the ground challenging that the order passed by the labour court in holding the departmental inquiry is illegal, is not just and proper.

#. Learned advocate Mr.A.M.Dagali for petitioner Corporation has submitted that the respondent workman who was working as Driver remained absent for a period from 16th June, 1995 to 26thJune, 1995. For this misconduct, chargesheet dated 21st July, 1995 was served wherein the period is specified is from 16th June, 1995 to 26th June, 1995. Therefore, Mr.Dagali, learned advocate has submitted that though the respondent workman was remained absent from 16th June, 1995 to 26th June, 1995 but his leave was not sanctioned by the petitioner Corporation. Thereafter, learned advocate Mr.Dagali has further submitted that there are two leave reports according to the explanation given by the respondent workman, one report for the period from 16th June, 1995 to 19th June, 1995 and the second report for a period from 19th June, 1996 to 26th June, 1995. According to the learned advocate Mr.Dagali, leave was refused for the period from 16th June, 1995 to 19th June, 1995 and same was intimated to the respondent workman. However, Mr.Dagali has vehemently submitted that the respondent driver had remained absent for the period from 16th June, 1995 to 26th June, 1995 without prior permission and this act of the workman amounts to serious misconduct. Over and

above, it is also pointed out that in past 43 defaults have been committed by the respondent workman, for that, once he was dismissed from service and this record was also produced by the Corporation before the labour court vide Exh.17 but the same has been ignored by the labour court at the time of passing the award. Mr.Dagali has also challenged that the order on preliminary issue declaring the departmental inquiry is vitiated, is also illegal and erroneous and contrary to the law. He also submits that the Corporation may not have any serious objection against reinstatement of the workman but the Corporation is mainly challenging the backwages part awarded by the labour court. He also submits that before the labour court, papers of departmental inquiry were on record and even though the labour court has ignored the same while passing the award granting the relief of reinstatement with 40 % backwages of the interim period in favour of the respondent workman.

#. Learned advocate Mr.J.K.Shah for respondent workman has submitted that the labour court has rightly considered the evidence of one Keshabhai who was examined before the labour court vide Exh.56, who proved these two reports at Exh.29 and 30. Learned advocate Mr.Shah has also submitted that no record has been produced by the petitioner Corporation and not proved the fact that said two reports, wherein leave was asked for by the respondent workman has been rejected or refused by the Corporation. Mr.Shah, learned advocate has also submitted that once the inquiry conducted by the Corporation is declared vitiated, then, it is burden upon the employer to prove alleged misconduct against the respondent workman by leading sufficient evidence and in the event, satisfactory evidence is not led to justify the misconduct or to prove the misconduct, then the labour court is certainly justified in granting the relief of reinstatement with backwages to the respondent workman. Therefore, learned advocate Mr.Shah submits that after the inquiry is declared vitiated, only two persons were examined vide Exh.48 and 50 by the petitioner Corporation and no other oral evidence was led by the petitioner Corporation. He also submits that vide Exh.48 one Shri Ashokkumar Jethalal Rawal who was examined, the competent authority who has passed the dismissal order and the second witness Kamalkant Kaushikkumar who was examined vide Exh.50 who has only deposed before the labour court that letter dated 16th April, 1999 has been addressed by him to the Divisional Controller, wherein witness or other officer viz. A.M.Pathan was examined in the departmental inquiry. The report was made against the respondent workman vide

Exh.49/1. Therefore, learned advocate Mr.J.K.Shah has submitted that once the inquiry is vitiated, then order of dismissal automatically requires to be set aside unless and until misconduct is proved by the petitioner Corporation by leading evidence and therefore also, the concerned workman is entitled to full backwages from the date of dismissal. Learned advocate Mr.Shah has submitted that in such situation, relate back is not applicable to the facts of this case. Learned advocate Mr.J.K.Shah has further submitted that the order passed on preliminary inquiry was not challenged at the relevant time by the petitioner Corporation before this Court and therefore, the petitioner Corporation is not entitled to challenge said order on preliminary point before this Court. It was separate order as well as independent orders requires to be challenged by the Corporation at the relevant time. He also submits that looking to the averments made in the petition and the prayer clause, there is no challenge in respect of the order which was passed on preliminary issue and therefore, when there is no prayer made by the Corporation challenging the order passed on preliminary point, this Court cannot examine the legality and validity of the order on preliminary point. He also submits that the labour court has examined the merits on the basis of the evidence which was led before the labour court and now this Court cannot reappreciate the fact finding which was observed by the labour court. He also submits that once the inquiry is declared vitiated, earlier papers of inquiry has no relevancy and same cannot be looked into by the labour court. Unless again by fresh evidence, if papers are produced before the labour court and therefore, whatever papers relied in the inquiry, the same are treated to have declared as vitiated and therefore, the same cannot be relied upon by the labour court while considering the fresh evidence which was led before the labour court. Therefore, the labour court has rightly appreciated the facts which are on record and granted reinstatement while coming to the conclusion that charge of remaining absent for period from 16th June, 1995 to 26th June, 1995 is not proved on the basis of the oral evidence and documents produced by the petitioner Corporation. No doubt, Mr.Shah has also challenged the direction issued by the labour court granting only 40 % backwages and for that, he has filed separate petition with prayer claiming 100 % backwages on the ground that merely having income from agricultural work cannot be said to be gainful employment of the respondent workman and therefore, denial of full backwages by the labour court on the basis that workman is having agricultural income, is erroneous finding of the labour court and the same requires to be rectified by

this Court while exercising the powers under Article 226 and 227 of the Constitution of India.

#. I have considered submissions of the learned advocates for the parties. Before the labour court, the respondent workman has challenged the dismissal order dated 8th December, 1995 which was based upon the chargesheet dated 21st July, 1995. It has come on record that the departmental inquiry which was conducted against the respondent workman has been declared invalid and vitiated by the labour court vide Exh.40. That order passed below Exh.40 is not challenged by the petitioner Corporation before this Court and not even in the present petition also, no such prayer is made except last moment draft amendment tendered before this Court challenging the said order at Exh.40. Not only this, it is also noticed that no copy of the said order at Exh.40 is annexed before this Court in the present petition. Therefore, challenge to the order on the preliminary issue, is an afterthought just to argue the matter on such technical point. In the present proceedings, wherein order in question is not annexed and no such prayer is made to that effect, then this Court cannot examine the legality and validity of the order at Exh.40. However, Learned advocate Mr.Dagali is not able to point out any infirmity in the order at Exh.40 passed by the labour court declaring the departmental inquiry as vitiated. The labour court has considered that the respondent driver was working with effect from 1st November, 1969 and he had sent two separate leave reports with his colleague for a period from 16th June, 1995 to 26th June, 1995. The labour court has relied upon oral evidence of one Kesha Ambubhai Patel at Exh.56 wherein he admits that he had given two leave reports of the workman to the concerned authority which is at Exh.29 and 30. This fact found support in the inquiry papers before the labour court and the labour court on the basis of the oral evidence of one Shri Keshabhai Patel led by the respondent workman vide Exh.56. It is also pertinent to note that below these two reports at Exh.29 and 30, wherein signature of receipt by the concerned officer was also found and therefore, submissions made by the learned advocate Mr.Dagali that the respondent workman has not submitted any leave report for period from 16th June, 1995 to 26th June, 1995 is not correct which is contrary to the record as discussed by the labour court in award. The labour court has also examined the second question that once the leave report was received by the concerned authority as per the evidence Exh.56, then whether that reports were sanctioned and / or rejected by the petitioner Corporation or not. On this issue, the labour

court has come to the conclusion that there was no evidence produced by the petitioner Corporation that leave in question has been refused or rejected by the Corporation. This aspect has not been proved by the petitioner Corporation before the labour court. Not only that, no such order was produced on record by the petitioner Corporation for the misconduct of remaining absent for a period from 16th June, 1995 to 26th June, 1995. On the basis of the fact that he remained absent without prior permission, is not proved because of oral evidence vide Exh.56 led before the labour court and Exh.29 and 30 has been proved beyond reasonable doubt and therefore, the labour court has come to the conclusion that chargesheet itself is illegal and bad and ultimately, the labour court has examined the question of backwages and considering the deposition of the respondent workman, come to the conclusion that the respondent workman having income from agricultural work and therefore, the labour court has granted 40 % backwages to the respondent workman.

#. In view of above observations made by the labour court while appreciating the oral and documentary evidence on record, according to my opinion, the labour court has rightly appreciated the evidence which was on record and rightly come to the conclusion that misconduct is not found to have proved that for a period from 16th June, 1995 to 26th June, 1995 the respondent workman remained absent without prior permission but in fact, two reports were sent by the respondent workman in time to the concerned authority through his colleague which is at Exh.29 and 30 and the same has been proved by the respondent workman by leading oral evidence of Keshabhai at Exh.56 and this evidence has not been challenged by the Corporation and therefore, conclusion of the labour court is justified on the basis of the evidence which was placed before the labour court by the respective parties. Therefore, according to my opinion, the labour court has not committed any error while passing such award.

#. It is also necessary to note one more important aspect though it was not considered by the labour court but according to my opinion, the same should have considered by the labour court. It is for the petitioner Corporation to justify the order of dismissal, otherwise, if the respondent workman has made submissions to the effect that once the inquiry is vitiated by the labour court, then dismissal order is bound to be set aside only on the ground that whatever evidence led by the Corporation to prove misconduct then, on that basis, whatever decision comes, will have prospective effect and

relate back principle is not applicable. This Court has examined this issue and in such situation, relate back principle is not applicable. Therefore, even otherwise also, the respondent workman is entitled to full backwages of the interim period while considering the question of relate back principle but since no such contention was raised by the workman before the labour court and therefore, I am not considering this aspect while examining the award in question.

#. Learned advocate Mr.Dagali for petitioner has vehemently relied on the past record, wherein 48 defaults reported to have committed by the workman and this record was produced before the labour Court vide Exh.17 and once he was dismissed from service. However, it is pertinent to note that what is relevancy of the past record is required to be justified by the Corporation. Merely production of past record before the labour court or High Court is not material let the past record reflects 48 defaults. The past defaults has no relevancy unless the corporation is able to justify that the past record is relevant and the same is considered by the Corporation while giving punishments and same has been ignored by the concerned Court while passing such award. There is nothing on record to show that at the time of passing dismissal order, past record whether considered by the competent authority or not. No document has been produced by the corporation before the labour court or before this Court and no such submission has been made the learned advocate before the labour court or even before this Court. If the past record is bad, same cannot be considered and applied to the facts of the case automatically at the time of imposing the punishment but for the punishment to be imposed by the Corporation, the same has to be justified by the punishing authority in relation to the past record and the misconduct in question. Such tendency on the part of the petitioner Corporation cannot be entertained by the Court. The labour court should have examined the issue looking to the gravity of misconduct in question, whether dismissal or any punishment imposed by the corporation or employer is justified or not ? At that time, if past record was considered by the authority, then, it required to make some submissions on the basis of the past record, otherwise, past records is totally irrelevant. Subsequently, at the time of making submissions, just to prejudice the court's mind, place on record the past record to justify their action, in that case, the Court will not consider such past record on the ground that it was not the part of the departmental inquiry papers and it was not shown to the workman before passing the order

of dismissal and no opportunity was given to the workman before passing the dismissal order and no explanation was called for before passing the dismissal order. In such situation, if the past record was not communicated to the respondent workman, same was not relied upon by the competent authority, then same cannot be considered against him at the time of making submissions to justify the action of the Corporation. Such approach of the Corporation cannot be entertained by this Court even by the labour court also. In the facts of the present case, the labour court has come to the conclusion that on the basis of the oral evidence that looking to the Exh.56, leave report submitted by the respondent workman produced at Exh.29 and 30 stand proved and this report has been admitted by the witness before the labour court. Therefore, once on the basis of oral and documentary evidence the labour court has come to the conclusion that the misconduct is not found to have proved and chargesheet itself is bad, then there is not need to consider the past record of the respondent workman. In such situation, the past record must have to be ignored by the labour court and rightly ignored by the labour court. In the present case, there is nothing on record produced by the Corporation that at the time of passing of order of dismissal, past record was considered before the labour court and this Court. The Corporation has not proved and justified that at the time of passing dismissal order, this record was shown to the workman concerned and explanation was called for from the workman concerned and an opportunity was given and thereafter, dismissal order was passed and therefore, according to my opinion, even this submission cannot be accepted. Therefore, no error has been committed by the labour court while passing the award and as such, there seems no jurisdictional error or no procedural irregularity committed by the labour court and hence, no interference of this Court is called for while exercising the powers under Article 226 and 227 of the Constitution.

##. According to submissions made by learned advocate Mr.Dagali that past record was produced before the labour court which was not considered by the labour court. In support of said submission, it was duty of the petitioner Corporation to prove the facts before the labour court that said past record was considered by competent authority at the time of passing dismissal order. But nothing was produced by Corporation and not justified before the labour court. The past record if not considered by competent authority at the time of passing dismissal order, then it cannot become part and parcel of the departmental inquiry. If it was considered and copy

of past record is not supplied to workman then also, such past record cannot be considered against the workman. The said past record is not a material on record. Nothing was produced and justified by the petitioner Corporation. Merely producing past record of the workman before the labour court for justifying dismissal order is not enough and such past record can be ignored in such circumstances. The Labour court can consider only materials on record while exercised the jurisdiction under Section 11-A of the I.D.Act, 1947. In such circumstances, past record is not material on record as required under Section 11-A of the I.D.Act, 1947. Such view has been taken by the Andhra Pradesh High Court in case of A.V.Swami v. Labour Court, Warangal and another reported in 1991 [II] LLJ 430. The relevant observations made in para 4 & 5 are quoted as under :-

"4. To appreciate the above argument of the Learned Counsel, it would be necessary to have a close look at the provisions of Section 11-A of the Industrial Disputes Act which is in the following terms :

"11-A power of labour court, tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman : Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of adjudication proceedings, the Labour Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require :

Provided that in any proceedings under this Section, the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh

evidence in relation to the matter."

"5. An analysis of this section shows that if the Labour Court is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may require. The proviso to the said section is extremely important for the purpose of the case on hand which reads that in any proceeding under this section, the Labour Court shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter. Therefore, the question is whether the past record of service comes within the category of "materials on record" for the purpose of this case. It is an undisputed fact that the past record of service was neither considered nor referred to by either the workman or the second respondent Corporation at the time of the enquiry against the petitioner. But the past record of service has been considered in a detailed fashion by the Labour Court while coming to the conclusion that the order of removal is justified in the circumstances of the case. In fact, about three full pages have been written about the past record of service of the petitioner. This past record of service is evidently not material on record as visualized in the proviso to Section 11-A. Therefore, the question is, would the Tribunal have come to the same conclusion, viz. that the order or removal is justified had it not looked into the past record of the petitioner. Suffice it to state that from the manner in which the award has been passed, it is easy to see that a lot of emphasis has been placed on the past record of service of the petitioner. The approach of the Industrial Tribunal was clearly wrong only on the basis of the appreciation of the material on record and not by taking into consideration the past record of service of the petitioner. In this view of the matter, the award dated April 3, 1987, passed by the Labour Court in I.D. No.141 of 1986 is set aside and the matter is remanded to the Industrial Tribunal for fresh consideration in accordance with the

provisions of Section 11-A of the Industrial Disputes Act especially the proviso to the said section, by taking into consideration only the materials on record and not the past record of service of the petitioner. The Labour Court may consider the matter and pass an award within two months from the date of receipt of this order."

##. Lastly, learned advocate Mr.Dagali submits that the departmental inquiry which has been declared vitiated but thereafter before the labour court, the respondent workman has made same admission which has been taken into account by the labour court while passing the award. This submission cannot be accepted because once the inquiry is declared vitiated by the labour court and that order is remained intact and not challenged by the Corporation and not set aside by the higher forum then whatever earlier inquiry papers and submissions and evidence led in the earlier inquiry has no relevancy and the same cannot be considered to be an evidence unless the same is proved before the labour court by leading fresh evidence by the employer. This view has been taken by the Apex Court in case of RAMSWAROOP MASAWAN V. MUNICIPAL COUNCIL reported in AIR 1999 SC pg.699. Relevant observations made in para 26 are referred as under :-

"26. The record pertaining to the domestic enquiry would not constitute "Fresh Evidence" as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute "material on record", as contended by the counsel for the respondent, within the meaning of Section 11-A at the enquiry proceedings, on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry could be, and, were in fact, relied upon by the Management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and that full opportunity of hearing was given to her in consonance with the principles of natural justice. This contention has not been accepted by the Labour Court and the enquiry has been held to be bad. In view of the nature of objection raised by the appellant, the record of enquiry held by the management ceased to be "material on record" within the meaning of Section 11-A of the Act and the only course open to the Management was to justify its action by leading fresh evidence as required by the labour

Court. If such evidence has not been led, the Management has to suffer the consequences."

##. Thus, all the contentions raised by Learned advocate Mr.Dagali are discussed above and except that, no other submission has been made by Mr.Dagali. It is also observed that Learned advocate Mr.Dagali also failed to point out any other infirmity in the award in question.

##. So far, Special Civil Application No.4155 / 2002 is concerned, the workman has challenged the award in question against denial of 60 % backwages of the interim period. I have considered the award passed by the labour court and as discussed above, this Court has upheld the award passed by the labour court. However, considering the contentions raised by the workman in support of his claim of full backwages, in view of this Court, the labour court has rightly considered some gainful employment of the respondent workman who was involved in agricultural activities. It is, therefore, observed that the labour court has rightly appreciated the evidence of the respondent workman and there is no standard formula that once the dismissal order is set aside, the workman becomes entitled to full backwages. However, grant of backwages depends upon discretionary powers of the court concerned and the labour court, on appreciating the facts and circumstances of the case, can grant appropriate backwages to the respondent workman. Therefore, the labour court has not committed any error in not granting 60 % backwages to the respondent workman and therefore, on both these counts, award passed by the labour court is found to be legal and valid. The labour court has given cogent reasons in support of its conclusion and there is no error found apparently on the face of record and therefore, there is no substance in the petition filed by the workman for enhancement of the backwages and the same also is also rejected at the threshold accordingly.

However, it is settled position of law that the powers of this Court are very limited while examining the legality and validity of the award passed by the labour court. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that

another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

In view of above discussion, both these petitions stand rejected accordingly. Rule in both these petitions stand discharged. No order as to costs.

Date : 16-4-2002 [H.K.Rathod, J.]

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